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Supreme Court, U.S.
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No. 07-

IN THE

Supreme Court of the United States

T-MOBILE USA, INC., VERISIGN, INC., JAMSTER INTERNATIONAL SARL,
Petitioners,

v.

CHARLES FORD, CAROL FOX DE STEFANO, INDIVIDUALLY, AND ON BEHALF OF OTHER PERSONS SIMILARLY SITUATED AND THE GENERAL PUBLIC,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether this petition for certiorari should be held pending this Court's disposition of the petition for certiorari previously filed in *T-Mobile USA, Inc.* v. *Laster*, No. 07-976 (filed Jan. 23, 2008), given that both cases present the same important question:

Whether, under the Federal Arbitration Act, a federal court may refuse to enforce the terms of an agreement to arbitrate based upon a state-law policy that individual arbitration is unconscionable in cases involving small claims by a consumer.

LIST OF PARTIES AND AFFILIATES

In addition to the parties listed in the caption, the following also were involved in the proceedings below: Debra Szalanski, David Haslet, Gerald Schuck, Jamba!, AT&T Wireless Services, Inc., Cingular Wireless, and New Cingular Wireless Services, Inc.

Pursuant to Rule 29.6 of the Rules of this Court, T-Mobile USA, Inc. states that it is a wholly-owned subsidiary of T-Mobile Global Holding GmbH, which is a wholly owned subsidiary of T-Mobile International AG, which, in turn, is a wholly owned subsidiary of Deutsche Telekom AG. Deutsche Telekom AG is a publicly traded company, of which approximately 14.83% and 16.87% is owned by the Federal Republic of Germany and the Kreditanstalt für Wiederaufbau (a bank controlled by the Government of the Federal Republic of Germany), respectively. No other publicly-held company owns 10% or more of T-Mobile USA, Inc.

VeriSign, Inc. has no parent corporation and no publicly held company owns 10% or more of its stock.

Jamster LLC has become the successor entity to Jamster International Sarl. Jamster LLC is owned 49% by VeriSign, Inc. (through a subsidiary) and 51% by Fox US Mobile Holdings, Inc. Fox US Mobile Holdings, Inc. is a subsidiary of News Corporation, a Delaware Corporation whose shares are issued to the public and traded on the New York Stock Exchange. Liberty Media Corporation, which itself issues shares to the public that are traded on the New York Stock Exchange has approximately 19% interest in the voting stock of News Corporation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners T-Mobile USA, Inc. ("T-Mobile"), VeriSign, Inc., and Jamster International Sarl (together, "petitioners") respectfully request that this Court grant the petition for a writ of certiorari to review the decision and judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The decisions of the United States District Court for the Southern District of California denying T-Mobile's and, separately, VeriSign and Jamster's motions to compel arbitration are unreported and are reproduced in the Appendix to this Petition ("Pet. App.") at 5a-18a and 19a-26a. The decision of the Ninth Circuit affirming the district court is likewise unreported and is reproduced at Pet. App. 1a to 4a.

JURISDICTION

This lawsuit originally was filed in California Superior Court and was removed to federal court in April 2005. The district court had jurisdiction under 28 U.S.C. §§ 1332(d) and 1453(b). The Ninth Circuit, which rendered its decision below on October 25, 2007, had appellate jurisdiction over the district court's denial of T-Mobile's motion to compel arbitration under 9 U.S.C. § 16(a)(1). On January 9, 2008, Justice Kennedy granted T-Mobile's application for an extension of time and thus extended the time within which to file a petition for a writ of certiorari to February 22, 2008. On January 17, 2008, Justice Kennedy granted the application of VeriSign and Jamster for an extension of time and thus extended the time within which to file a petition for a writ of

certiorari to February 22, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 2 of the Federal Arbitration Act, 9 U.S.C. § 2, provides in pertinent part:

> A written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist in law or equity for the revocation of any contract.

STATEMENT OF THE CASE

This case presents the recurring question whether Section 2 of the Federal Arbitration Act ("FAA") permits federal courts to refuse to enforce private agreements that expressly preclude class-based arbitration because state law deems individual arbitration of consumer claims to be substantively unconscionable. This is the same issue that is raised in the petition for certiorari in *T-Mobile USA, Inc.* v. *Laster*, No. 07-976 (filed Jan. 23, 2008). For the reasons fully set forth in the petition in *Laster*, the question presented warrants the grant of certiorari. Accordingly, petitioners respectfully request that this case be held pending disposition of the petition in *Laster* and resolved consistent with that petition.

Respondents Charles Ford and Carol Fox de Stefano, with her husband, were T-Mobile subscribers who each entered into contracts agreeing to resolve any disputes with T-Mobile through individual arbitration. Notwithstanding those agreements, they filed a class action on behalf of themselves and all

similarly situated consumers worldwide claiming that petitioners violated California law by assessing and/or passing on allegedly unauthorized charges for ringtones that had been downloaded to respondents' phones.[1]

The court below, applying prior Ninth Circuit and California Court of Appeal precedent in *Shroyer* v. *New Cingular Wireless Services, Inc.*, 498 F.3d 976 (9th Cir. 2007), and *Gatton* v. *T-Mobile USA, Inc.*, 152 Cal. App. 4th 571 (2007), held that respondents' arbitration agreements with T-Mobile were unenforceable because they provided for individual and not class-wide arbitration.

As set forth in T-Mobile's pending petition for certiorari in *Laster* (No. 07-976), such decisions are in conflict with the Third Circuit's ruling in *Gay* v. *CreditInform*, 511 F.3d 369 (3d Cir. 2007). There, the Third Circuit, relying on this Court's decision in *Perry* v. *Thomas*, 482 U.S. 483 (1987), ruled that the FAA precludes a court from refusing to enforce an agreement to arbitrate individually based upon a state-law determination that individual arbitration of small consumer claims is unconscionable. 511 F.3d at 395. The *Gay* court concluded that state unconscionability standards are preempted to the extent that they would render individual arbitration unenforceable. Denying enforcement on those grounds, the Third Circuit explained, would be tantamount to "'rely[ing] on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforce-

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[1] The three remaining named plaintiffs in the proceedings below were not customers of T-Mobile and thus their claims are not part of this petition.

ment would be unconscionable.'" *Id.* (quoting *Perry*, 482 U.S. at 492 n.9).[2]

Since the Third Circuit issued its decision in *Gay*, the Ninth Circuit has expressly declined "to follow the Third Circuit's holding in *Gay*." *Lowden* v. *T-Mobile USA, Inc.*, 512 F.3d 1213, 1221 n.3 (9th Cir. 2008). And, more recently, a majority of the Supreme Court of North Carolina followed the approach staked out by the Ninth Circuit and other courts in striking down an arbitration agreement that required individual arbitration, *Tillman* v. *Commercial Credit Loans, Inc.*, 655 S.E.2d 366, 373 (N.C. 2008), whereas the dissent would have upheld the agreement to arbitrate under the Third Circuit's ruling in *Gay*, *id.* at 387 (Newby, J., dissenting).

This case, like the ruling in *Laster*, implicates the same conflict over the enforceability of agreements to arbitrate consumer claims individually. In the ruling below, the Ninth Circuit applied *Shroyer* to hold that the FAA does not mandate enforcement of these agreements. Pet. App. 3a-4a. In contrast, the Third Circuit in *Gay* ruled that the FAA does require enforcement of agreements requiring individual arbitration of consumer claims, and thus preempts state law to the contrary. Moreover, the Third, Fourth, Seventh, and Eleventh Circuits all have held – unlike the

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[2] The *Gay* decision builds on decisions by other federal circuits holding that individual arbitration is appropriate for resolving federal and state claims by consumers in cases involving relatively small individual amounts. *See Johnson* v. *West Suburban Bank*, 225 F.3d 366, 373 (3d Cir. 2000); *accord Jenkins* v. *First Am. Cash Advance*, 400 F.3d 868, 878 (11th Cir. 2005), *cert. denied*, 546 U.S. 1214 (2006); *Livingston* v. *Associates Fin., Inc.*, 339 F.3d 553, 559 (7th Cir. 2003); *Snowden v. CheckPoint Check Cashing*, 290 F.3d 631, 638-39 (4th Cir. 2002); *Randolph* v. *Green Tree Fin. Corp.*, 244 F.3d 814, 818 (11th Cir. 2001).

decision below – that individual arbitration allows for the effective resolution of claims in cases involving consumers. See Pet'n for Certiorari at 11-25, *T-Mobile USA, Inc.* v. *Laster*, No. 07-976 (filed Jan. 23, 2008).

Resolution of this conflict is necessary because the proper application of the FAA to consumer arbitration agreements presents a recurring issue of fundamental and national importance. The enforceability of agreements to arbitrate under the FAA is a matter that affects the rights of tens of millions of consumers and businesses. Indeed, a state-law rule that arbitration must provide a class-wide mechanism for resolving disputes directly undercuts the benefit of arbitration as a streamlined, low-cost *alternative* to litigation. Decisions by courts that invalidate the terms of these arbitration agreements directly undermine the "primary purpose" of the FAA: to counteract judicial hostility to arbitration and to ensure that arbitration remains a viable alternative to litigation through enforcement of agreements to arbitrate in accordance with their terms. See *Volt Info. Scis., Inc.* v. *Board of Trs.*, 489 U.S. 468, 479 (1989); 9 U.S.C. § 4; see also Pet'n for Certiorari at 25-29, *T-Mobile USA, Inc.* v. *Laster*, No. 07-976 (filed Jan. 23, 2008).

Petitioners request that this case be held pending the disposition of the petition for certiorari in *Laster*, No. 07-976 (filed Jan. 23, 2008), and resolved as appropriate in light of that disposition.

STATUTORY BACKGROUND

In 1925, Congress enacted the FAA in response "to hostility of American courts to the enforcement of arbitration agreements." *Circuit City Stores* v. *Adams*, 532 U.S. 105, 111 (2001). Congress sought to promote arbitration as a meaningful alternative to

litigation. "[B]y agreeing to arbitrate, a party 'trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.'" *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991). Indeed, "it is typically a desire to keep the effort and expense required to resolve a dispute within manageable bounds that prompts [parties] to forgo access to judicial remedies." *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 633 (1985). For that reason, "Congress, when enacting [the FAA], had the needs of consumers, as well as others, in mind." *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 280 (1995).

The "primary purpose" of the FAA is to "ensur[e] that private agreements to arbitrate are enforced according to their terms." *Volt Info. Scis., Inc.* v. *Board of Trs.*, 489 U.S. 468, 479 (1989). Arbitration agreements must be "rigorously enforce[d]" even if "the result is 'piecemeal' litigation." *Dean Witter Reynolds Inc.* v. *Byrd*, 470 U.S. 213, 221 (1985). Indeed, Section 2 of the FAA "compels judicial enforcement of a wide range of written arbitration agreements," *Circuit City*, 532 U.S. at 111, "'notwithstanding any state substantive or procedural policies to the contrary.'" *Perry* v. *Thomas*, 482 U.S. 483, 489 (1987) (quoting *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)); see also *Preston* v. *Ferrer*, No. 06-1463, slip op. at 5 (U.S. Feb. 20, 2008).

Under the FAA, "the underlying issue of arbitrability" is "a question of substantive federal law," *Southland Corp.* v. *Keating*, 465 U.S. 1, 12 (1984), that "must be addressed with a healthy regard for the federal policy favoring arbitration," *Moses H. Cone*, 460 U.S. at 24. In determining whether an agree-

ment to arbitrate is enforceable, "the text of § 2 provides the touchstone for choosing between state-law principles and the principles of federal common law." *Perry*, 482 U.S. at 492 n.9. As explained in *Perry*, "[a]n agreement to arbitrate is valid, irrevocable, and enforceable, *as a matter of federal law* 'save upon such grounds as exist at law or in equity for the revocation of *any* contract.'" *Id.* (quoting 9 U.S.C. § 2) (internal citation omitted; emphasis added by Court). "[S]tate law . . . is applicable *if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally." *Id.* at 493 n.9.

"Courts may not . . . invalidate arbitration agreements under state laws applicable *only* to arbitration provisions." *Doctor's Assocs. Inc.* v. *Casarotto*, 517 U.S. 681, 687 (1996); see *Perry*, 482 U.S. at 493 n.9. Likewise, courts may not (i) refuse enforcement based on state laws applicable only to certain types or categories of contracts, *Southland*, 465 U.S. at 16 n.11; *Preston*, slip op. at 8, or (ii) rely upon a fundamental aspect of arbitration as a basis for a ruling that arbitration is unconscionable, *Perry*, 482 U.S. at 493 n.9.

FACTUAL BACKGROUND

Petitioner T-Mobile markets and sells wireless telecommunications services, phones, and accessories throughout the United States. Petitioner Jamster sells downloadable content, including ringtones, to mobile phone customers. Petitioner VeriSign appears to have been named in the underlying action because Jamster used to be its wholly-owned subsidiary. In addition to telephone services, T-Mobile enables its wireless customers to send and receive digital content, including customized ringtones. Often this content is offered not by T-Mobile itself, but rather by third parties, such as petitioner Jamster.

Digital content is transmitted via T-Mobile's network, which may result in a separate charge, depending on a customer's rate plan. See 9th Cir. Excerpts of Record ("ER") at 59-60. Further, where customers enter fee-based arrangements with a third party related to such digital content, T-Mobile passes on such charges to the applicable customers, much as local telephone companies sometimes include long distance providers' charges as separate line items on bills. *Id.*

a. On March 20, 2003, respondent Charles Ford acquired two new phones from T-Mobile and activated service through T-Mobile. Each phone was accompanied by the T-Mobile Welcome Guide, which set forth in full the terms and conditions of service. At the very beginning of the Guide, Ford was advised of an "Important Note: By using T-Mobile service, you acknowledge that you have read and agree to the terms and conditions of the Service Agreement." ER 76. The service agreement provided Ford with ample opportunity (at least 14 days) to cancel service without paying any cancellation fee. ER 101. Ford chose to keep the phones, to continue his T-Mobile service, and to accept the corresponding terms and conditions. See ER 70. Indeed, on at least four subsequent occasions Ford acquired additional new phones or modified his contract, each time agreeing to the applicable terms and conditions of service. *Id.*

Section 3 of those Terms and Conditions sets forth an arbitration agreement, which provides that it is governed by "the Federal Arbitration Act and federal arbitration law" and that "[n]either you nor we may be a representative of other potential claimants or a class of potential claimants in any dispute, nor may two or more individuals' disputes be consolidated or otherwise determined in one proceeding." Pet. App.

29a, 30a. The arbitration agreement is reproduced at Pet. App. 29a-31a.[3]

b. On November 12, 2002, the husband of respondent Carol Fox de Stefano bought phones from T-Mobile for himself and his wife, and activated service with T-Mobile. ER 71. Additional phones were added to the account in June 2003 and June 2004. ER 72. Each phone was accompanied by the applicable Welcome Guide containing the terms and conditions of use, including the mandatory arbitration provision, which was materially identical to that described above.[4] Indeed, when respondent Carol Fox de Stefano purchased the phone in June 2004, she signed a new Service Agreement, and the words appearing directly above her signature are, "All disputes are subject to mandatory arbitration in accordance with paragraph 3 of the Terms and Conditions." ER 184-87. Like respondent Ford, the de Stefanos did not exercise their right to terminate service, and thus evidenced their agreement to its terms and conditions.

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[3] The arbitration agreement applicable at the time of Ford's original March 2003 initiation of service (reproduced in full at Pet. App. 27a-28a) differed from the above-quoted language, but it likewise included a mandatory arbitration provision and a class action waiver. *See id.* By their own terms, those original terms and conditions were superseded when Ford agreed to the revised T-Mobile terms and conditions quoted above upon purchasing subsequent phones and changing his rate plan. *See* ER 99.

[4] The arbitration provision reproduced at Pet. App. 27a-28a, applied at the time of the de Stefanos' original initiation of service, whereas the provision reproduced at *id.* at 29a-31a, and described in the main text above, applied in June 2004 and was printed in full in the service agreement that Plaintiff signed at that time. *See* ER 184-88.

c. Notwithstanding respondents' agreements to arbitrate any disputes with T-Mobile on an individual basis, in March 2005, Ford filed a putative "worldwide" class action in California state court. De Stefano joined as a plaintiff upon amendment of the complaint in July 2005.[5] Respondents advanced seven California causes of action arising from the downloading of ringtones from petitioner Jamster. Respondents sought to extend liability to petitioner VeriSign on purported alter ego grounds, and to petitioner T-Mobile for allegedly improperly passing on charges related to the downloads. See First. Am. Compl. at 11-28 (ER 23-40). They sought injunctive relief, restitution, rescission, "compensatory damages[,] pre-judgment interest, costs of suit and attorney's fees," and "punitive damages." *Id.* at 29 (ER 41).

d. After removal to federal court, petitioners moved to compel arbitration under the FAA. Pet. App. 6a. On December 19, 2005, the district court denied T-Mobile's motion, ruling that the arbitration agreement was unconscionable under *Discover Bank* v. *Superior Court*, 113 P.3d 1100 (Cal. 2005), because it required individual arbitration. Pet. App. 13a-14a. The court concluded that the arbitration agreement was procedurally unconscionable due to "[t]he adhesive nature of the contract and the unequal bargaining power," *id.* at 10a, notwithstanding the court's finding that consumers were not surprised by the arbitration provisions. *Id.* ("The T-Mobile arbitration

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[5] As noted, the other three named plaintiffs did not have agreements with T-Mobile, and therefore their claims are not implicated by this petition. *See* Jamster and VeriSign's Supplemental Letter Brief to the Ninth Circuit, at 1 n.1 (Sept. 20, 2007) (dropping appeal of the district court's denial of the motion to compel arbitration as to the three plaintiffs who were not T-Mobile customers).

provision is the third term in the terms and conditions, and the only term in all capital letters.").

Further, although the court found that the T-Mobile arbitration agreements *do* permit the recovery of attorney's fees in the arbitral forum to the same extent they would be available in court, Pet. App. 12a & n.4, it deemed them unconscionable because they required individual arbitration and thus did not allow class-wide proceedings. *Id.* at 14a (citing *Discover Bank*, 113 P.3d at 1110). The court also ruled, again following *Discover Bank*, that the FAA did not preempt its unconscionability analysis. *Id.* at 15a (following *Discover Bank*, 113 P.3d at 1112). The district court separately denied Jamster's and VeriSign's motion to compel arbitration, adopting the reasoning of its order denying T-Mobile's motion. *Id.* at 19a-26a.

e. The Ninth Circuit affirmed. It concluded, in an unpublished per curiam decision, that T-Mobile's arbitration agreement was "not substantively distinguishable" from an agreement that the Ninth Circuit had previously refused to enforce in *Shroyer* v. *New Cingular Wireless Services, Inc.*, 498 F.3d 976 (9th Cir. 2007). Pet. App. 3a. The panel below explained that *Shroyer* "rejected the argument that California law is preempted by the Federal Arbitration Act" and that it lacked "the authority to revisit the decision of a prior three-judge panel." *Id.*

REASONS FOR GRANTING THE PETITION

This case implicates a conflict among the lower federal courts on the question whether the Federal Arbitration Act requires enforcement of agreements to arbitrate consumer disputes on an individual basis, or whether such agreements can be invalidated based on state-law policy in favor of class actions.

The issue presented in this case is the same as the one squarely presented in a prior petition filed by petitioner T-Mobile that is pending before this Court. *T-Mobile USA, Inc.* v. *Laster*, No. 07-976 (filed Jan. 23, 2008). The *Laster* case involved a single version of the T-Mobile arbitration agreement and the class claims addressed a single discrete type of transaction implicating only the relationship between T-Mobile and its customers with respect to the sales tax associated with the purchase of a free wireless phone. See Pet'n for Writ of Certiorari at 6-11, *Laster*, No. 07-976. As explained in the *Laster* Petition, that case presents an ideal vehicle to address and resolve the same conflict presented in this case. While the issue presented in this case is equally worthy of review, no reason exists to consider more than one petition raising that same question.

To promote efficiency, petitioners request that the Court grant review in *Laster* and hold the petition in this case pending the disposition in *Laster*.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be held pending the Court's disposition of *T-Mobile USA, Inc.* v. *Laster*, No. 07-976 (filed Jan. 23, 2008), and then disposed of accordingly.

Respectfully submitted,

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February 22, 2008

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 06-55082
D.C. No. CV-05-00819-JTM

CHARLES FORD; *et al.*,
Plaintiffs - Appellees,

v.

VERISIGN, INC.; *et al.*,
Defendants,

and

T-MOBILE USA, INC.,
Defendant - Appellant.

JUDGMENT

Appeal from the United States District Court for the Southern District of California (San Diego).

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California (San Diego) and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is AFFIRMED.

Filed and entered 10/25/07

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed Oct. 25, 2007]

No. 06-55082
D.C. No. CV-05-00819-JTM

CHARLES FORD; DEBRA SZALANSKI; CAROL FOX DE STEFANO; DAVID HASLET; GERALD SCHUCK, individually, and on behalf of other persons similarly situated and the general public,

Plaintiffs - Appellees,

v.

VERISIGN, INC.; JAMSTER!; JAMBA!; AT&T WIRELESS SERVICES, INC.; CINGULAR WIRELESS; NEW CINGULAR WIRELESS SERVICES, INC.,

Defendants,

and

T-MOBILE USA, INC.,

Defendant - Appellant.

Appeal from the United States District Court
for the Southern District of California
Jeffrey T. Miller, District Judge, Presiding

Submitted October 16, 2007*
Pasadena, California

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* The panel unanimously finds these cases suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

[Filed Dec. 19, 2005]

Case No. 05 CV 0819 JM (RBB)

CHARLES FORD, DEBRA SZALANSKI, CAROL FOX DE STEFANO, DAVID HASLET, and GERALD SHUCK, individually, and on behalf of other persons similarly situated and the general public,

Plaintiffs,

v.

VERISIGN, INC.; JAMSTER INTERNATIONAL SARL; T-MOBILE USA, INC.; AT&T WIRELESS SERVICES, INC.; NEW CINGULAR WIRELESS SERVICES, INC.; CINGULAR WIRELESS, LLC; and DOES 1 through 100, inclusive,

Defendants.

ORDER DENYING DEFENDANTS' MOTION TO DISMISS AND TO COMPEL ARBITRATION AND GRANTING MOTION TO STAY OBLIGATION TO ANSWER

Background

Plaintiffs have filed a putative class action complaint against VeriSign Inc. ("VeriSign"), Jamster International SARL ("Jamster"), T-Mobile USA, Inc. ("T-Mobile"), AT&T Wireless Services, Inc. ("AT&T"), New Cingular Wireless Services, Inc.

("New Cingular"), and Cingular Wireless, LLC ("Cingular Wireless"), alleging that Defendants caused Plaintiffs to incur unauthorized charges on their cell phone bills.[1] Among other claims, Plaintiffs allege a violation of the Consumers Legal Remedies Act ("CLRA"), California Civil Code section 1750 *et seq*. Defendants T-Mobile and Cingular have filed motions to compel arbitration of these claims.

Analysis

The Federal Arbitration Act ("FAA") applies to arbitration provisions found in written agreements that evidence a transaction involving commerce. 9 U.S.C. § 2. An agreement to arbitrate is "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." *Id.* A motion to compel arbitration must be granted if (1) there is a valid agreement to arbitrate, and (2) the dispute at issue falls within the scope of that agreement. *See Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1130 (9th Cir. 2000). The court does not have the discretion to deny a motion to compel arbitration if there is a valid arbitration agreement. *See* 9 U.S.C. § 4; *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985).

The parties do not dispute that the issue here plainly falls within the broad scope of the arbitration provision of the wireless services contracts to arbitrate "any dispute or claim arising from or relating to this Agreement." Therefore, the focus here is on whether there is a valid agreement to arbitrate.[2]

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[1] For simplicity, AT&T, New Cingular and Cingular Wireless will be referred to collectively as Cingular.

[2] Plaintiffs identify and analyze two versions of Cingular's arbitration provision as well as the provision contained in the

Federal policy favors arbitration, and arbitration agreements may not be placed in a disfavored position relative to other contracts. *See Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1170 (9th Cir. 2003). However, arbitration agreements are subject to general contract defenses such as duress, fraud, and unconscionability. *See Armendariz v. Found. Health Psychcare Servs. Inc.*, 24 Cal.4th 83, 114 (2000). "To evaluate the validity of an arbitration agreement, federal courts 'should apply ordinary state-law principles that govern the formation of contracts.'" *Ingle*, 328 F.3d at 1170 (citations omitted). Plaintiffs oppose the motion to compel arbitration on the grounds that the arbitration agreement is unconscionable.

In California, a contract provision must be both procedurally and substantively unconscionable to be unenforceable. *See Armendariz*, 24 Cal.4th at 114. Courts use a sliding scale in this analysis. "[T]he more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa." *Id.* at 114.

A. Procedural Unconscionability

Procedural unconscionability focuses on the degree of "oppression" or "surprise" in a contract term.

AT&T contract. Although some Plaintiffs entered into service contracts containing the first version of Cingular's provision, Cingular's second arbitration provision amended those contracts. After AT&T and Cingular merged their wireless businesses, Cingular made its second arbitration provision available to AT&T customers. Therefore, the terms of Cingular's second arbitration provision are analyzed herein as those terms have been made available to all Cingular and AT&T customers. *See also Parrish v. Cingular Wireless LLC*, 28 Cal.Rptr.3d 802, 814 n.14 (Cal. Ct. App. 2005).

Armendariz, 24 Cal.4th at 114. Essentially, the analysis of "oppression" considers whether there is "unequal bargaining power." *Id.* "Surprise" looks at the degree to which the terms are hidden in a contract drafted by the party in the superior bargaining position. *See Crippen v. Central Valley RV Outlet*, 124 Cal.App.4th 1159, 1165 (Cal. Ct. App. 2004). One court has cautioned that "courts often reflexively conclude the finding of an adhesion contract alone satisfies the procedural prong, and immediately move on to substantive unconscionability. . . . Undue reliance on any one procedural factor to the exclusion of others may produce analytical myopia and obscure the larger unconscionability picture." *Morris v. Redwood Empire Bancorp*, 128 Cal.App.4th 1305, 1318 (Cal. Ct. App. 2005).

1. Oppression

a. Meaningful alternatives

Plaintiffs have not submitted any evidence that they lacked meaningful alternatives to Cingular and T-Mobile and rely solely on cases which state that the existence of alternatives is not dispositive. Although it is Plaintiffs' burden, Defendants have offered some evidence that Plaintiffs may have had the option of choosing a wireless services provider that did not require arbitration. At least one California court has stated that "oppression" may be defeated "if the complaining party has a meaningful choice of reasonably available sources of supply from which to obtain the desired goods and services free of the terms claimed to be unconscionable." *Morris*, 128 Cal.App.4th at 1319-20. Other courts, however, have not viewed this factor as dispositive. *See Szetela v. Discover Bank*, 97 Cal.App.4th 1094, 1100 (Cal. Ct. App. 2002) ("The availability of similar goods or ser-

vices elsewhere may be relevant to whether the contract is one of adhesion, but even if the clause at issue here is not an adhesion contract, it can still be found unconscionable."); *see also Ting v. AT&T*, 319 F.3d 1126, 1149 (9th Cir. 2003) (viewing with skepticism the argument that the existence of choice necessarily overcomes a charge of oppression).

b. Contracts of adhesion

Courts have not explicitly held that a non-negotiable form contract is, *per se*, procedurally unconscionable. *Compare Morris*, 128 Cal. App. 4th at 1319-20 ("Although adhesion contracts often are procedurally oppressive, this is not always the case."); *Crippen*, 124 Cal.App.4th at 1165 ("[T]here is no general rule that a form contract used by a party for many transactions is procedurally unconscionable."); *with Lozano v. AT&T Wireless*, 2003 U.S. Dist. LEXIS 21794, * 10 (C.D.Cal. Aug. 29, 2003) ("[A] finding of a contract of adhesion is essentially a finding of procedural unconscionability.").

The Ninth Circuit has interpreted California law to find that a contract is procedurally unconscionable "if it is a contract of adhesion, *i.e.*, a standardized contract, drafted by the party of superior bargaining strength, that relegates to the subscribing party only the opportunity to adhere to the contract or reject it." *Ting*, 319 F.3d at 1148. Following *Ting*, district courts have examined wireless services contracts and the manner in which they are created between the company and the consumer, and have held consistently that they are procedurally unconscionable because of the unequal bargaining power and lack of opportunity to negotiate. *See Gatton v. T-Mobile, Inc.*, 2003 U.S. Dist. LEXIS 25922, *31 (C.D. Cal. Apr. 21, 2003); *Lozano*, 2003 U.S. Dist. LEXIS 21794 at *9-10.

But see Iberia Credit Bureau Inc. v. Cingular Wireless LLC, et al., 379 F.3d 159, 176 (5th Cir. 2004) (upholding Cingular's arbitration provision under Louisiana law).

2. Surprise

The arbitration provisions are not buried in the terms and conditions of the T-Mobile and Cingular contracts. The T-Mobile arbitration provision is the third term in the terms and conditions, and the only term in all capital letters. The first paragraph of Cingular's terms and conditions gives the consumer notice that the terms contain a mandatory arbitration provision. Furthermore, if the Court assumes that Plaintiffs read the terms and conditions, *see Randas v. YMCA of Met. Los Angeles*, 17 Cal.App.4th 158, 163 (Cal. Ct. App. 1993), then Plaintiffs cannot claim they were surprised by the presence of the arbitration provision in their subsequent contracts with T-Mobile and Cingular. Plaintiff Ford also orally consented to arbitrate disputes with T-Mobile when he called customer service to take advantage of a promotional offer. Although Ford was not told the details of arbitration before he consented over the phone, he would have already received a written copy of the terms at the time he purchased his phone.[3]

Plaintiffs' failure to show a lack of meaningful alternatives, repeated engagement of wireless services, and the absence of surprise point toward finding an absence of procedural unconscionability. The adhesive nature of the contract and the unequal bargain-

[3] While it is difficult to conclude that a customer who orally agrees to a term was surprised by the term, the term is still oppressive in so far as the oral agreement is as non-negotiable as the written agreement.

ing power, however, weigh in favor of finding procedural unconscionability. These factors alone, at times, have been enough to tip the balance. *See Gatton*, 2003 U.S. Dist. LEXIS 25922 at *31 ("[B]ecause the arbitration provision is the result of unequal bargaining power between the subscriber and T-Mobile, with no opportunity to negotiate the offending terms, the Court narrowly finds the provision procedurally unconscionable."). Therefore, the Court narrowly finds the provision procedurally unconscionable.

B. Substantive Unconscionability

"Substantive unconscionability focuses on the one-sidedness of the contract terms." *Ting*, 319 F.3d at 1149. California law requires a "modicum of bilaterality." *Armendariz*, 24 Cal.4th at 117. Plaintiffs challenge three clauses of the arbitration provision as unconscionable: (1) the fee-sharing provision; (2) the limitation on available remedies; and (3) the class action waiver.

1. Fee-sharing

Plaintiffs argue that the requirement in the T-Mobile contract that the customer pay $25 of the arbitrator's fees if the amount in issue is between $25 and $1000 and an equal share of the arbitrator's fees if the claim is more than $1000 is unconscionable under *Ting*. The T-Mobile contract provides that the parties will share equally all other costs and expenses, but the Cingular contract provides for Cingular to assume all costs of arbitration unless the claim is found to be frivolous.

In *Ting*, the court found the fee-splitting scheme unconscionable "because it imposes on some consumers costs greater than those a complainant would

bear if he or she would file the same complaint in court." *Ting*, 319 F.3d at 1151. Just as a claimant would not pay for a judge, a claimant cannot be made to pay for an arbitrator. *See Armendariz*, 24 Cal.4th at 108. However, a claimant can be required to pay the filing fees and other administrative expenses associated with arbitration as it would if he or she were appearing in a judicial forum. *Id.*

Requiring T-Mobile customers to pay the arbitrator's fees is unconscionable under *Ting* and *Armendariz*. The fact that the customer is only paying $25 of the arbitrator's fees is inconsequential because a plaintiff does not pay *any* of a judge's fees or salary in a judicial proceeding.

2. Limitation on remedies

Plaintiffs also challenge the portion of the arbitration provisions that requires each party to pay their own attorney's fees. Plaintiffs argue that attorney's fees are part of the statutory remedy in the statutes pled here and, therefore, they cannot be precluded from recovering these fees in arbitration. Both Cingular and T-Mobile argue that the rules governing the arbitration proceedings do not preclude the recovery of statutory remedies and T-Mobile notes that its agreement specifically provides that the arbitrator may award the same relief as would be available in court.[4] Therefore, the Court does not find the provisions on available remedies unconscionable.

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[4] The language of the agreements, arguably, is not crystal clear on this point. However, because Defendants have now taken the position that Plaintiffs are not limited in their ability to collect attorney's fees provided for by statute in arbitration, they are estopped from arguing otherwise later.

3. Class action waiver

Plaintiffs' more significant argument is that the California Supreme Court's recent decision in *Discover Bank v. Superior Court*, 36 Cal.4th 148 (2005), holding class action waivers in certain consumer contracts of adhesion unconscionable, renders the arbitration provision here similarly unconscionable. Defendants vigorously dispute Plaintiff's argument and urge the Court to reject the California Supreme Court's conclusion that its holding is not preempted by the FAA.

a. Scope of the prohibition on class action waivers

The Ninth Circuit has clearly held that prohibitions on representative actions or class actions are unconscionable under California law when the ban would only apply to one party. *See Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1176 (9th Cir. 2003); *Ting*, 319 F.3d at 1150; *Szetela v. Discover Bank*, 97 Cal.App.4th 1094, 1101 (Cal. Ct. App. 2002). In *Ting*, the court reasoned that while the prohibition purported to apply to both the company and the consumer, in reality, the company would never file a class action lawsuit against a consumer. Thus, the prohibition lacked bilaterality. *Ting*, 319 F.3d at 1150. Applying *Ting*, other district courts have invalidated class action waivers in the arbitration provisions of wireless services contracts. *See, e.g., Gatton*, 2003 U.S. Dist. LEXIS 25922 at *37-38 (severing the provision prohibiting class actions in a T-Mobile contract before granting the motion to compel arbitration); *Lozano*, 2003 U.S. Dist. LEXIS 21794 at *12-13.

The California Supreme Court recently took a narrower stance and held that class action waivers are

only unconscionable under certain circumstances. *See Discover Bank*, 36 Cal. 4th at 162-63. In particular, the court held that such waivers were prohibited when "found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money." *Id.* at 162-63. The court further held that the FAA did not preempt this prohibition on class-action waivers. *Id.* at 163 ("the principle that class action waivers are, under certain circumstances, unconscionable as unlawfully exculpatory is a principle of California law that does not specifically apply to arbitration agreements, but to contracts generally.").

Discover Bank creates more of a categorical rule than Defendants acknowledge. While the contracts maybe "consumer-friendly," the California Supreme Court did not carve out exceptions and the agreements at issue here fall squarely within the category of contracts which cannot contain a class action waiver under *Discover Bank*. The agreements are contracts of adhesion and the amount of damages are likely to be relatively small amounts. Plaintiffs' First Amended Complaint contains allegations that T-Mobile and Cingular engaged in a deliberate scheme to cheat large numbers of consumers out of small amounts of money (*i.e.*, the cost of text messaging).

b. Preemption

This Court finds no basis for rejecting the conclusion of the California Supreme Court that its rule in *Discover Bank* is not preempted by the FAA. Federal law requires the enforcement of arbitration agree-

ments except "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. State laws that single out arbitration provisions for scrutiny are preempted. *See Doctor's Assocs. v. Casarotto*, 517 U.S. 681, 687 (1996). The California Supreme Court reasoned that the prohibition on class action waivers under certain circumstances was not preempted because it was a principle governing contracts generally, rather than "a state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue." *Discover Bank*, 36 Cal.4th at 165 (citing *Perry v. Thomas*, 482 U.S. 483 (1987)). The court emphasized that the rule was not arbitration-specific. "In other words, it applies equally to class action litigation waivers in contracts without arbitration agreements as it does to class arbitration waivers in contracts with such agreements." *Id.* at 165-66.

Defendants argue that because *Discover Bank* only invalidates class action waivers for a certain subset of contracts, its rule does not apply to "any" contract and, accordingly, it is preempted by the FAA. *See Southland v. Keating et al.*, 465 U.S. 1, 11 (1984). They contend that the Ninth Circuit's holding in *Ting*, as well as its holding in *Bradley v. Harris Research, Inc.*, 275 F.3d 884 (9th Cir. 2001), compel a finding of preemption, In *Ting*, the Ninth Circuit held that the FAA preempted the California Consumers Legal Remedies Act ("CLRA") where the CLRA allowed consumers to bring class actions within a three-year period and the arbitration provision at issue mandated individual actions within two years. *Ting*, 319 F.3d at 1148. Similarly in *Bradley*, the court held that the FAA preempted the California Franchise Relations Act's ("CFRA") arbitration venue provisions. *Bradley*, 275 F.3d at 890. In both of these

opinions the court noted that statutory provision did not apply to "all" contracts, but only to those within the scope of that particular statute. *See Ting*, 319 F.3d at 1148; *Bradley*, 275 F.3d at 890. *Bradley* explained the relevant distinctions as follows:

> It is possible to construe the Supreme Court's holding in *Doctor's Assocs.* as being limited to state statutes that "single out" arbitration provisions, as opposed to statutes that affect both arbitration and litigation; however, the Court's reasoning is based on the principle that only state law that addresses the enforcement of "contracts generally" is not preempted by the FAA. Perry, in turn, was based on language in the FAA stating that an agreement to arbitrate is valid, irrevocable, and enforceable, "save upon any grounds as exist at law or in equity for the revocation of any contract." Thus, even though the statute at issue in *Doctor's Assocs.* addressed only contracts subject to arbitration, the reasoning of *Doctor's Assocs.* and *Perry*, as well as the language of 9 U.S.C. § 2, indicate that a state law that invalidates arbitration agreements is not preempted by the FAA only if the law is "generally applicable" or applies to "any contract."

Bradley, 275 F.3d at 890 (citations omitted).

The cases on which Defendants rely involve the preemption of contract-specific statutes, and are consistent with the Supreme Court's characterization of the FAA as intending to "foreclose state legislative attempts to undercut the enforceability of arbitration agreements." *Perry*, 482 U.S. at 489. In *Discover Bank*, the California Supreme Court applied the common law principle of unconscionability, and unconscionability is a grounds for invalidating an arbi-

tration agreement that is not subject to preemption. *Discover Bank* does not limit the applicability of the doctrine of unconscionability to a certain subset of contracts; rather it simply applies the unconscionability analysis to circumstances involving a class action waiver. Any and all contracts are still subject to invalidation on the grounds of unconscionability.

Contrary to Defendants' assertion, holding a class action waiver unconscionable under these circumstances does not increase the risk that there will be a lack of uniformity in how these contracts will be construed in other jurisdictions. Contracts, including agreements to arbitrate, have always been subject to general contract defenses that have developed under state law.

The Court, therefore, finds that the class action waiver is unenforceable and holds that the FAA does not preempt the rule of *Discover Bank*. Because the arbitration provisions expressly provide that the invalidation of the class action waiver will void the entire provision, the Court does not have the option of severing the clause. Therefore, the Court denies the motion to compel arbitration as to both T-Mobile and Cingular.

Motion To Stay the Obligation To Answer or Other-wise Respond to the Complaint

Defendants have filed a motion to stay its obligation to answer the complaint while the motion to compel arbitration is pending on the grounds that filing an answer or response might be construed as a waiver of its right to compel arbitration. This motion is granted.

Conclusion

For all the above reasons, Defendant's motion to dismiss and to compel arbitration is DENIED and Defendants are ORDERED to file an answer to the complaint within thirty days, nunc pro tunc to September 16, 2005.

IT IS SO ORDERED.

DATED: 12/16, 2005

/s/ Jeffrey T. Miller
JEFFREY T. MILLER
United States District Judge

cc: all parties

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

[Filed Dec. 15, 2005]

CASE NO. 05 CV 0819 JM (RBB)

CHARLES FORD, DEBRA SZALANSKI, CAROL FOX DE STEFANO, DAVID HASLET, and GERALD SHUCK, individually, and on behalf of other persons similarly situated and the general public,

Plaintiffs,

vs.

VERISIGN, INC.; JAMSTER INTERNATIONAL SARL; T-MOBILE USA, INC.; AT&T WIRELESS SERVICES, INC.; NEW CINGULAR WIRELESS SERVICES, INC.; CINGULAR WIRELESS, LLC; and DOES 1 through 100, inclusive,

Defendants.

ORDER DENYING DEFENDANTS' MOTION TO COMPEL ARBITRATION, GRANTING DEFENDANTS' MOTION TO DISMISS WITHOUT PREJUDICE, AND DISMISSING DEFENDANTS' MOTION TO STRIKE CLASS ALLEGATIONS

Background

Plaintiffs have filed a putative class action first amended complaint ("FAC") against VeriSign Inc. ("VeriSign"), Jamster International SARL ("Jamster"), T-Mobile USA, Inc. ("T-Mobile"), AT&T Wireless Services Inc., New Cingular Wireless Services Inc., and Cingular Wireless LLC (collectively "Cingular"), alleging that Defendants caused Plaintiffs to

incur unauthorized charges on their cell phone bills. Plaintiffs have filed on behalf of Worldwide Class, a United States class, a United States Minor class, a California class, and a California Minor class. The putative classes are comprised of those persons or minors in the respective, geographical areas "who responded to any advertisement of mobile content by [VeriSign and Jamster], and in doing so, were unknowingly subscribed to a service whereby they were billed on their Wireless Provider account for charges and associated fees for mobile content." FAC ¶ 30. Plaintiffs allege causes of action for (1) fraud; (2) negligent misrepresentation; (3) false advertising in violation of California Business & Professions Code §§ 17500 *et seq.*; (4) violation of the Consumers Legal Remedies Act ("CLRA"), California Civil Code §§ 1750 *et seq.*, by advertising without intent to sell as advertised; (5) violation of the CLRA by inserting an unconscionable provision into a contract, California Civil Code § 1770(a)(19); (6) unfair competition in violation of California Business & Professions Code § 17200; and (7) unfair competition by contracting with minors.

Motion To Compel Arbitration

Defendants T-Mobile and Cingular filed motions to compel arbitration of the claims asserted against them in this action, which were heard in this Court on November 18, 2005. The validity of the arbitration provision was discussed at that time. Defendants Jamster and VeriSign have argued that the claims against them are also subject to arbitration because they are third-party beneficiaries of the arbitration agreement. For the reasons set forth in the Order Denying Defendant T-Mobile and Cingular's Motion To Dismiss and To Compel Arbitration and Granting

Motion To Stay Obligation To Answer, the present motion to compel arbitration is denied.

Standard of Review for Motion To Dismiss

Federal Rule of Civil Procedure 12(b)(6) allows a court to dismiss a complaint for failure to state a claim upon which relief can be granted. Such a dismissal can be based on either the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory. *See Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1988). In applying this standard, the court must treat all of the plaintiffs factual allegations as true. *See Experimental Eng'g, Inc. v. United Technologies Corp.*, 614 F.2d 1244, 1245 (9th Cir. 1980). However, the court does not have to accept as true conclusory allegations that contradict facts which may be judicially noticed or which are contradicted by documents referred to in the complaint. *See, e.g., Steckman v. Hart Brewing Inc.*, 143 F.3d 1293, 1295-1296 (9th Cir. 1998). To dismiss with prejudice, it must appear to a certainty that the plaintiff would not be entitled to relief under any set of facts that could be proven. *See Reddy v. Litton Indus.*, 912 F.2d 291, 293 (9th Cir. 1990), *cert. denied*, 502 U.S. 921 (1991). The court does not consider the likelihood that the plaintiff can prevail, just whether the allegations in the complaint, if proven, would be sufficient. *See Jacobson v. Hughes Aircraft Co.*, 105 F.3d 1288, 1292 (9th Cir. 1997).

Sufficiency of the Complaint

Defendants have argued that the complaint fails to allege a false representation and relies instead on Plaintiffs' mistaken beliefs. Defendants further argue that the allegations of fraud are not pled with

particularity as required by Rule 9(b) of the Federal Rules of Civil Procedure.

Plaintiffs allege fraud under two different theories. First, Plaintiffs claim they are the victims of an affirmative fraud because the Jamster website represented that if customers "register[ed] now" they would "get one ringtone for free." Second, Plaintiffs claim that the television advertisements failed to inform consumers that by sending a text message to the number advertised they were signing up for a subscription plan under which they would receive and be billed for additional text messages. This omission, according to the complaint, was a material misrepresentation.

Allegations of fraud are subject to Rule 9(b) of the Federal Rules of Civil Procedure, which requires the plaintiff to plead with particularity the circumstances of the fraud or the basis of the mistake. Fed. R. Civ. P. 9(b); *Vess v. Ciba-Geigy Corp.*, 317 F.3d 1097, 1103-04 (9th Cir. 2003). The allegations of fraud must include the time, place, and specific content of the false representation. *See Miscellaneous Service Workers, Drivers & Helpers v. Philco-Ford Corp.*, 661 F.2d 776, 782 (9th Cir. 1981). Courts have also phrased the heightened pleading standard as requiring "the who, what, when, where, and how of the misconduct charged." *Vess*, 317 F.3d at 1106.

Plaintiffs have generally identified a misrepresentation or omission, stated the approximate time that it occurred and whether the representation was via television or the Internet. However, with respect to each individual representative plaintiff, Plaintiffs have not adequately alleged which theory of fraud applies to each of the representative plaintiffs, nor have they alleged with specificity the circumstances

or context surrounding the representations that were made to each plaintiff, Therefore, Plaintiffs' first, second, third, fourth, and sixth causes of action are dismissed without prejudice and Plaintiffs are hereby granted leave to amend.[1]

Fifth Cause of Action

Plaintiffs allege that the inclusion of a provision in Jamster's Terms of Service that selects Virginia law as the law governing disputes is unconscionable and therefore violates the CLRA, California Civil Code § 1770(a)(19). Defendants argue that this cause of action should be dismissed as to VeriSign because VeriSign is not a party to Jamster's Terms of Service. Defendants also argue that the provision is not *per se* unconscionable and, therefore, the claim is not adequately pled.

A. VeriSign's Liability Under Jamster's Terms of Service

"Generally, a parent company is not liable for the contracts and torts of its subsidiary, even if wholly owned, unless the parent controls the subsidiary to such a degree as to render the latter a mere instrumentality of the former." *Standard Wire & Cable Co. v. Ameritrust Corp.*, 697 F.Supp. 368, 374

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[1] Plaintiffs concede that the causes of action for fraud and negligent misrepresentation are subject to Rule 9(b). Plaintiffs' third, fourth, and sixth causes of action are for violations of California Business & Professions Code §§ 17500 *et seq.*, California Civil Code §§ 1750 *et seq.*, and California Business & Professions Code § 17200, respectively. Although these statutes do not necessarily require fraud as an element, where, as here, plaintiffs have alleged a unified course of fraudulent conduct in support of claims brought under these statutes, the allegations sounding in fraud are subject to Rule 9(b)'s pleading requirements. *See Vess*, 317 F.3d at 1104.

(C.D. Cal. 1988). Adequate pleading of alter-ego liability requires (1) allegations of a unity of interest between the entities, and (2) allegations that treating the acts as the corporation's alone would lead to an inequitable result. *See Neilson v. Union Bank of Cal. N.A.*, 290 F.Supp.2d 1101, 1115 (C.D. Cal. 2003). However, "conclusory allegations of 'alter-ego' status are insufficient to state a claim." *Id.* at 1116. Plaintiffs must allege the specific elements of alter-ego liability and facts supporting each element. *Id.*

In their complaint, Plaintiffs have alleged a unity of interest between VeriSign and Jamster, but have not provided facts to support the second element of alter-ego liability. Plaintiffs only conclude that "[a]dherence to the fiction of separate existence of the corporate defendant Jamster as an entity distinct from VeriSign would permit an abuse of the corporate privilege and would sanction fraud or promote injustice." FAC ¶ 15. "California courts generally require some evidence of bad faith conduct on the part of defendants before concluding that an inequitable result justifies an alter-ego finding." *Neilson*, 290 F.Supp.2d at 1117. Accordingly, the fifth cause of action is dismissed against VeriSign.

B. Section 1770(a)(19)

The CLRA prohibits "inserting an unconscionable provision in the contract." Cal. Civ. Code § 1770(a)(19). Under Section 1780, any consumer who suffers damage because of an act that has been declared unlawful in Section 1770 may bring an action. Plaintiffs rely primarily on *AOL v, Mendoza*, in which the court held that a Virginia choice of law provision was unenforceable because "[e]nforcement of the contractual forum selection clauses would be the functional equivalent of a contractual waiver of

consumer protections under the CLRA." *AOL v. Mendoza*, 90 Cal.App.4th 1, 18 (Cal. Ct. App. 2001). The CLRA allows consumers to bring class action suits to remedy a violation, while Virginia law bars class actions. *Id.* at 17-18.

Unconscionability is a matter of law and not fact. Plaintiffs must allege facts and cannot rest on a conclusory assertion that a provision is unconscionable. *See Vance v. Villapark Mobilehome Estates*, 36 Cal.App.4th 698, 709 (Cal. Ct. App. 1995). The facts alleged here—namely, the existence of the provision—only amount to a conclusion that the provision is unenforceable. "Unenforceable" is not the same as "unconscionable."

Furthermore, California Civil Code section 1780 provides that "[a]ny consumer who suffers damage as the result of . . . a practice declared to be unlawful by Section 1770" may bring an action. Thus far, Defendants have not tried to enforce the Governing Law provision. The mere presence of the provision does not cause an injury to Plaintiffs; indeed if it did, it would be nearly impossible for a company with a nationwide business to use a form contract.

Therefore, the fifth cause of action is dismissed for failure to state a claim.

Motion To Strike Worldwide Class Definition

Plaintiffs have brought the third and sixth causes of action (for false advertising in violation of California Business & Professions Code § 17500 and violation of California's Unfair Competition Law, California Business & Professions Code § 17200, respectively) on behalf of a "Worldwide Class" consisting of those customers of T-Mobile and Cingular who were unknowingly subscribed to a service

whereby they were charged for content provided by Jamster and VeriSign during the relevant time period. Defendants have moved to strike Plaintiffs' allegations of a Worldwide Class as too large to be manageable, for failing to meet the requirements of commonality and typicality, and on the grounds that Plaintiffs are not adequate class representatives of the Worldwide Class.

Plaintiffs have not yet brought a motion for class certification, nor has there been any discovery in this matter. At this time the Court does not make any finding with respect to whether Plaintiffs may represent a worldwide class and dismisses the motion to strike as premature.

Conclusion

For all the above reasons, Defendants' motion to compel arbitration is **DENIED**, Defendants' motion to dismiss is **GRANTED** without prejudice, and Defendants' motion to strike class allegations is **DISMISSED**.

IT IS SO ORDERED.

DATED: 12/14, 2005

/s/ Jeffrey T. Miller
JEFFREY T. MILLER
United States District Judge

cc: all parties

APPENDIX E

T-MOBILE TERMS AND CONDITIONS

* * * *

3. Mandatory Arbitration: Dispute Resolution. ANY CLAIM OR DISPUTE BETWEEN YOU AND US IN ANY WAY RELATED TO OR CONCERNING THE AGREEMENT, AND/OR OUR PROVISION TO YOU OF GOODS, SERVICE, OR UNITS SHALL BE SUBMITTED TO FINAL, BINDING ARBITRATION WITH THE AMERICAN ARBITRATION ASSOCIATION ("AAA") PURSUANT TO ITS PUBLISHED WIRELESS INDUSTRY ARBITRATION RULES, INCORPORATED HEREIN BY THIS REFERENCE AND AVAILABLE BY CALLING THE AAA AT 800-778-7879 OR VISITING ITS WEB SITE AT www.adr.org. Any arbitration proceeding shall be subject to the choice of law provision in paragraph 22. Notice of an arbitration commenced by you must be served on our registered agent. No party may act as a representative of other claimants or potential claimants in any dispute, and two or more individuals' disputes may not be consolidated or otherwise determined in one proceeding. An arbitrator may not award relief in excess of or inconsistent with the provisions of the Agreement, order consolidation or arbitration on a classwide basis, or award lost profits, punitive, incidental, or consequential damages or any other damages other than the prevailing party's direct damages, except that the arbitrator may order injunctive or declaratory relief pursuant to applicable law. All administrative expenses of an arbitration will be equally divided between you and Us, except if the claim is less than $100, you will be obligated to pay only $25. If the claim is less than $25, We will pay all administrative expenses. Each party agrees

to pay the fees and costs of its own counsel, experts, and witnesses at the arbitration. Subject to the foregoing limitations on consolidated or classwide proceedings, you agree, however, that if you fail to timely pay amounts due, We may assign your account for collection and the collection agency may pursue such claims in court limited strictly to the collection of the past due debt and any interest or cost of collection permitted by law or the Agreement.

YOU ACKNOWLEDGE AND AGREE THAT THIS ARBITRATION PROVISION CONSTITUTES A WAIVER OF ANY RIGHT TO LOST PROFITS, PUNITIVE, SPECIAL, INDIRECT, INCIDENTAL, CONSEQUENTIAL, OR TREBLE DAMAGES ("DISCLAIMED DAMAGES"), A JURY TRIAL OR PARTICIPATION AS A PLAINTIFF OR AS A CLASS MEMBER IN A CLASS ACTION. IF FOR ANY REASON THIS ARBITRATION CLAUSE IS DEEMED INAPPLICABLE OR INVALID, YOU AND WE BOTH WAIVE ANY CLAIMS TO RECOVER DISCLAIMED DAMAGES AND ANY RIGHT TO PURSUE, OR PARTICIPATE AS A PLAINTIFF OR AS A CLASS MEMBER IN, CLAIMS ON A CLASSWIDE, CONSOLIDATED, OR REPRESENTATIVE BASIS.

* * * *

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T-MOBILE TERMS AND CONDITIONS

* * * *

3. Mandatory Arbitration: Dispute Resolution. YOU WILL FIRST NEGOTIATE WITH US IN GOOD FAITH TO SETTLE ANY CLAIM OR DISPUTE BETWEEN YOU AND US IN ANY WAY RELATED TO OR CONCERNING THE AGREEMENT, OR OUR PROVISION TO YOU OF GOODS, SERVICES, OR UNITS ("CLAIM"). YOU MUST SEND A WRITTEN DESCRIPTION OF YOUR CLAIM TO OUR REGISTERED AGENT (See Sec. 22). IF YOU DO NOT REACH AGREEMENT WITH US WITHIN 30 DAYS, INSTEAD OF SUING IN COURT, YOU AGREE THAT ANY CLAIM MUST BE SUBMITTED TO FINAL, BINDING ARBITRATION WITH THE AMERICAN ARBITRATION ASSOCIATION ("AAA") UNDER ITS PUBLISHED WIRELESS INDUSTRY ARBITRATION RULES, WHICH ARE A PART OF THE AGREEMENT BY THIS REFERENCE AND ARE AVAILABLE BY CALLING THE AAA AT 800-778-7879 OR VISITING ITS WEB SITE AT www.adr.org. You must serve our registered agent (See Sec. 22) with a notice of an arbitration in order to begin an arbitration. This agreement to arbitrate extends to claims that you assert against other parties, including without limit equipment manufacturers and dealers, if you also assert claims against us in the same proceeding. The Agreement involves interstate commerce and despite the choice of law provision in Sec. 25, the Federal Arbitration Act and federal arbitration law govern arbitrations under the Agreement. An arbitrator may only award as much relief as a court having jurisdiction in the place of arbitration, limited to the same extent that a court would limit such relief and consistent with the

provisions of the Agreement. An arbitrator may order injunctive or declaratory relief (so long as that injunctive or declaratory relief does not apply beyond your dealings with us) or summary judgment under applicable law. AAA has a fee schedule for arbitrations. You will pay your share of the arbitrator's fees except: (a) for claims less than $25, we will pay all arbitrator's fees and (b) for claims between $25 and $1000, you will pay $25 for the arbitrator's fee. You and we agree to pay our own other fees, costs and expenses including those for counsel, experts, and witnesses. Visit www.adr.org arbitrator fee information in hardship circumstances.

Neither you nor we may be a representative of other potential claimants or a class of potential claimants in any dispute, nor may two or more individuals' disputes be consolidated or otherwise determined in one proceeding. While the prohibition on consolidated or classwide proceedings in this Sec. 3 will continue to apply: (a) you may take claims to small claims court, if they qualify for hearing by such court and (b) if you fail to timely pay amounts due, we may assign your account for collection and the collection agency may pursue such claims in court limited strictly to the collection of the past due debt and any interest or cost of collection permitted by law or the Agreement. YOU AND WE ACKNOWLEDGE AND AGREE THAT THIS SEC. 3 WAIVES ANY RIGHT TO A JURY TRIAL OR PARTICIPATION AS A PLAINTIFF OR AS A CLASS MEMBER IN A CLASS ACTION. IF A COURT OR ARBITRATOR DETERMINES THAT YOUR WAIVER OF YOUR ABILITY TO PURSUE CLASS OR REPRESENTATIVE CLAIMS IS UNENFORCEABLE, THE ARBITRATION AGREEMENT WILL NOT APPLY AND OUR DISPUTE WILL BE RESOLVED BY A

COURT OF APPROPRIATE JURISDICTION, OTHER THAN A SMALL CLAIMS COURT. SHOULD ANY OTHER PROVISION OF THIS ARBITRATION AGREEMENT BE DEEMED UNENFORCEABLE, THAT PROVISION SHALL BE REMOVED, AND THE AGREEMENT SHALL OTHERWISE REMAIN BINDING.

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No. 07-1103

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In The
Supreme Court of the United States

T-MOBILE USA, INC., VERISIGN, INC., and JAMSTER INTERNATIONAL SARL,

Petitioners,

v.

CHARLES FORD, CAROL FOX DE STEFANO, individually and on behalf of all other persons similarly situated and the general public,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Is a state required to enforce a class action waiver because it is contained within an arbitration agreement when the state would be free to find the same class action waiver invalid if it was contained in a contract that did not have an arbitration agreement?

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STATEMENT OF THE CASE

Section 2 of the Federal Arbitration Act (FAA), 9 U.S.C. § 2, states that arbitration provisions "shall be valid, irrevocable, and enforceable, save upon *such grounds as exist in law or equity for the revocation of any contract.*" (Emphasis added). Nowhere in the FAA is there authority to hold arbitration agreements above other contracts. Rather, it is settled law that the FAA places "arbitration agreements on *equal footing* with all other contracts." *Buckeye Check Cashing, Inc. v. Cardegan,* 546 U.S. 440, 443 (2006) (emphasis added); *see also Doctor's Assocs., Inc. v. Casarotto,* 517 U.S. 681, 687 (1996).

Despite settled law, Petitioners seek to abrogate long standing principals of jurisprudence and elevate arbitration agreements to a status above other contracts. There is no "state-law principal" involved in this case that "takes its meaning precisely from the fact that a contract to arbitrate is at issue," *Perry v. Thomas,* 482 U.S. 483, 493 fn. 9 (1987), as Petitioners suggest. Instead, Petitioners take a contract term that is otherwise unenforceable in an agreement without an arbitration provision and tether the enforcement of that term to the enforcement of the arbitration agreement as a whole. Then, when that contract term is found unconscionable under generally applicable state-law principals and the arbitration agreement is voided by the very terms T-Mobile drafted, Petitioners cry foul and claim that arbitration agreements are being singled out for treatment different than other contractual agreements.

If a contract term that would otherwise be considered unconscionable is enforceable simply because it is contained in an arbitration agreement, then arbitration agreements are given special treatment at the cost of state substantive law generally applicable to all contracts. This position is contrary to previous holdings by this Court as well as the plain language of the FAA.

Furthermore, there is no conflict, as suggested by Petitioners, between the Third Circuit ruling in *Gay v. CreditInform,* 511 F.3d 369 (3d Cir. 2007) in and the Ninth Circuit's rulings in *Shroyer v. New Cingular Wireless Services, Inc.,* 498 F.3d 976 (9th Cir. 2007) and *Lowden v. T-Mobile USA, Inc.,* 512 F.3d 1213 (9th Cir. 2008). The court in *Gay* never considered an arbitration agreement that, by the very terms drafted by the party seeking arbitration, would be rendered unenforceable if a class action waiver contained in the agreement was found unconscionable. Nor did the court in *Gay* even consider a law of general applicability as did the courts in *Shroyer* and *Lowden*.

Respondents request Petitioners' writ for certiorari be denied. Respondents additionally request that this matter not be stayed pending disposition of the petition for certiorari in *T-Mobile USA, Inc. v. Laster,* No. 07-976 (filed January 23, 2008).

STATEMENT OF FACTS

Respondents seek to represent millions of mobile phone users who, after sending a text message or responding to an Internet advertisement, were unknowingly signed up to a subscription for Jamster products and services with reoccurring charges. (Petitioners' [Pet.] Brief p. 20a). Jamster would advertise ringtones and wallpapers on the television and Internet. (*Id.* at 22a.) Consumers, many of whom were children, would see the advertisements and send a text message to obtain a single ringtone or wallpaper. (*Id.* at 20a & 22a.) Unbeknownst to the consumer, by sending a single text message they were actually signing up for a weekly and/or monthly subscription that resulted in reoccurring charges ranging from $1.99 to $5.99. (*See e.g. id.* at 14a, 22a.) T-Mobile[1] would place these charges on the consumer's monthly phone bill as well as charge consumers for text messaging charges associated with Jamster products and services. (*See e.g. id.* at 14a, 20a). When consumers attempted to cancel the services they faced tremendous roadblocks. Some consumers were forced to cancel their entire mobile phone service in order to avoid accruing any more charges. Respondents brought a class action to stop the abusive practices engaged in by Petitioners and Cingular.

---

[1] Cingular is also a party to this action but withdrew its appeal to the Ninth Circuit following the decision in *Shroyer v. New Cingular Wireless Servs., Inc.*, 498 F.3d 976 (9th Cir. 2007).

After filing the Complaint, T-Mobile sought to enforce its arbitration agreement that consumers are required to accept as a condition for using T-Mobile's products and services. VeriSign, Inc. and Jamster International Sarl claimed rights under the arbitration agreement as third party beneficiaries. VeriSign, Inc. and Jamster International Sarl also claimed third party beneficiary rights under the Cingular agreement but chose, like Cingular, to not pursue appeal of the matter after the decision in *Shroyer v. New Cingular Wireless Servs., Inc.*, 498 F.3d 976 (9th Cir. 2007).

As part of T-Mobile's mandatory arbitration agreement, T-Mobile requires consumers waive their right to resolve disputes through a class action or a representative action. T-Mobile ties application of the arbitration provision to enforcement of the class action waiver. Specifically, T-Mobile includes the following language in its agreement:

> "IF A COURT OR ARBITRATOR DETERMINES THAT YOUR WAIVER OF YOUR ABILITY TO PURSUE CLASS OR REPRESENTATIVE CLAIMS IS UNENFORCEABLE, THE ARBITRATION AGREEMENT WILL NOT APPLY AND OUR DISPUTE WILL BE RESOLVED BY A COURT OF APPROPRIATE JURISDICTION . . . " (Pet. Brief at 30a-30b (capitalization original).)

This term, as well as every other portion of the arbitration agreement, was drafted by T-Mobile.

In ruling on T-Mobile's Petition to Compel Arbitration, the district court applied state substantive law concerning class action waivers as set forth by the California Supreme Court in *Discover Bank v. Superior Court (Boehr),* 36 Cal.4th 148, 113 P.3d 1100 (Cal. 2005). The Court in *Discover Bank* provides the following analysis as to the enforcement of class action waivers in general:

> "We do not hold that all class action waivers are necessarily unconscionable. But when the waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then, at least to the extent the obligation at issue is governed by California law, the waiver becomes in practice the exemption of the party 'from responsibility for [its] own fraud, or willful injury to the person or property of another.' ([Cal.] Civ. Code § 1668.) Under these circumstances, such waivers are unconscionable under California law and should not be enforced." *Discover Bank,* 36 Cal.4th at 162-163; 113 P.3d at 1110. (*See also* Pet. Brief at 13a-14a.)

Notably, whether or not the class action waiver is included as part of an arbitration agreement has no bearing on the determination of whether the class

action waiver is unconscionable. In fact, the California Supreme Court stated:

> "the principle that class action waivers are, under certain circumstances, unconscionable as unlawfully exculpatory is a principle of California law that does not specifically apply to arbitration agreements, but to contracts generally. In other words, it applies equally to class action litigation waivers in contracts without arbitration agreements as it does to class arbitration waivers in contracts with such agreements." *Discover Bank*, 36 Cal.4th at 165-166; 113 P.3d at 1112.

The district court, applying the principals outlined in *Discover Bank* to the class action waiver, properly found the waiver unconscionable. (Pet. Brief at 17a.) Accordingly, the district court ruled that "[b]ecause the arbitration provisions expressly provide that the invalidation of the class action waiver will void the entire provision, the Court does not have the option of severing the class. Therefore, the Court denies the motion to compel arbitration as to both T-Mobile and Cingular." (*Id.*)

Petitioners then appealed the decision to the Ninth Circuit Court of Appeals. The Ninth Circuit denied the appeal, following the precedent set forth in *Shroyer*.

REASONS FOR DENYING THE WRIT

Petitioners have failed in their Petition for Writ of Certiorari to present an issue of imperative public importance that would justify deviation from normal appellate procedure. There is no constitutional question at issue in this matter, this Court has already spoken as to the requirement that the FAA be placed on the same legal footing as other contracts, and there is no conflict between the Circuit Courts of Appeals. The writ procedure should not be used as a mechanism by which a party who is unhappy with a contract term that it drafted can avoid the results of its own actions or forestall litigation affecting a large group of consumers.

A. The "Question Presented" By Petitioners Does Not Apply To This Action

The "Question Presented" as framed by Petitioners does not apply to the present action. Neither the district court nor the Ninth Circuit Court of Appeals refused "to enforce the terms of an agreement to arbitrate based upon a state-law policy that individual arbitration is unconscionable in cases involving small claims by a consumer." (Pet. Brief at p. i.) Instead, the district court applied generally applicable state-law and found the *class action* waiver to be unconscionable. Because the very terms of the agreement drafted by T-Mobile prohibited arbitration if the class action waiver was found unenforceable, the district court could not order arbitration. As such,

Petitioners have failed to present this Court with a question that is applicable to the facts and circumstances of this action.

B. Application Of State Substantive Law Concerning Class Action Waivers Does Not Implicate The FAA

The FAA is not applicable to state substantive law concerning enforcement of class action waivers. In *Amchen Products, Inc. v. Windsor,* 521 U.S. 591, 617 (1997), this Court affirmed that class actions are important procedural means for resolving disputes involving small amounts of money: "The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights." California has long held that classwide arbitration is an available procedure for resolution of disputes. *Keating v. Superior Court*, 31 Cal.3d 584, 613-614 (1982), 645 P.2d 1192, *overruled on other grounds in Southland Corp. v. Keating*, 465 U.S. 1 (1984). However, the fact that class actions can be arbitrated does not preclude states from finding class action waivers unconscionable under certain circumstance that are completely separate from whether or not they are contained in an arbitration agreement.

The FAA was never intended as a means to dictate to states what laws can apply to the revocation of contracts in general. *See* 9 U.S.C. § 2. Rather,

the purpose of the FAA was to "ensure judicial enforcement of privately made agreements to arbitrate." *Dean Witter Reynolds, Inc. v. Byrd,* 470 U.S. 213, 219 (1985). In denying arbitration in this action, the district court enforced the agreement as drafted by T-Mobile. Specifically, the district court found that "[b]ecause the arbitration provisions expressly provide that the invalidation of the class action waiver will void the entire provision, *the Court does not have the option of severing the clause.*" (Pet. Brief p.17a (emphasis added).) The FAA does not require courts to make terms that are otherwise unenforceable enforceable because they are contained in an arbitration agreement. *Prima Paint v. Flood & Conklin Mfg. Co.,* 388 U.S. 395, 404 fn. 12 (1967) (the Act was designed "to make arbitration agreements as enforceable as other contracts, but not more so"). Had T-Mobile not included a clause voiding the arbitration provision, this action would likely be in arbitration as a class action.

C. There Is No Conflict Between The Ninth Circuit And The Third Circuit As To The Issue Of Class Action Waivers In Arbitration Agreements

Petitioners seek review of this matter based, in part, upon what they believe is a conflict between the Third Circuit's ruling in *Gay v. CreditInform,* 511 F.3d 369 (3d Cir. 2007) and the Ninth Circuit's rulings in *Shroyer* and *Lowden.* However, no such conflict exists.

The plaintiff in *Gay* sought to defeat arbitration by claiming the *statutes* upon which she based her claims required a judicial forum, thus precluding arbitration in general. *Id.* at 379. Plaintiff further claimed that a specific statute provided her the right to assert her claims as a class action. *Id.* In particular, plaintiff "argues with respect to its terms the arbitration provision is unconscionable because it requires cases to proceed 'on an individual basis not consolidated with any other claim,' . . . and therefore is 'the functional equivalent of a denial of Ms. Gay's request to represent a class of similarly situated consumers.'" *Id.* at 392. Essentially, plaintiff sought to invalidate the entire arbitration agreement because it contained a class action waiver.

In *Shroyer* and in *Lowden,* the Ninth Circuit applied California and Washington law, respectively, to the class action waiver. After application of the holding in *Discover Bank*, the court in *Shroyer* found the class action waiver unconscionable and, because the Cingular arbitration provision had a nonseverability clause voiding the arbitration agreement and prohibiting an arbitrator from presiding over a class action, arbitration could not be compelled. *Shroyer,* 498 F.3d at 986-987. The Ninth Circuit in *Lowden* came to the same conclusion after applying Washington state-law to a T-Mobile contract. *Lowden,* 512 F.3d at 1221. Furthermore, in the opinion in *Lowden,* the Ninth Circuit specifically addressed and distinguished the decision in *Gay*: "[u]nlike the Third Circuit's conclusion as to the applicable state law in

Gay, we determine that the Washington Supreme Court in *Scott* does not hold 'that an agreement to arbitration may be unconscionable simply because it is an agreement to arbitrate.'" *Id.* at 1221 fn. 3 *citing Gay,* 511 F.3d at 395.

Petitioners also attempt to tie the state court decision of *Tillman v. Commercial Credit Loans, Inc.*, 655 S.E.2d 362 (N.C. 2008), to this litigation in order to bolster their illusion of conflict between the Circuits. The issue before the court in *Tillman* was not the same as the issue before Ninth Circuit in *Shroyer* and in *Lowden*. In *Tillman,* the Court looked at the *entire* arbitration agreement, which happened to contain a class action waiver, and determined the *entire* agreement was unconscionable. *Tillman,* 655 S.E.2d at 370. Finding that an arbitration agreement is unconscionable under generally applicable state-law principals has long been permissible under the FAA. *Doctor's Assocs., Inc.,* 517 U.S. at 686.

In *Shroyer, Lowden* and the present case, however, the Courts found the *class action waiver* unconscionable under generally applicable state-law principals and, as a result of the nonseverability language in the contracts at issue, could not order arbitration.

There is no conflict between the Circuits that support granting writ relief. Therefore, Respondents request this Court deny Petitioners' petition.

CONCLUSION

Based on the foregoing, this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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IN THE

Supreme Court of the United States

T-MOBILE USA, INC., VERISIGN, INC.,
JAMSTER INTERNATIONAL SARL,
Petitioners,

v.

CHARLES FORD, CAROL FOX DE STEFANO,
INDIVIDUALLY, AND ON BEHALF OF OTHER PERSONS
SIMILARLY SITUATED AND THE GENERAL PUBLIC,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

In their Petition, T-Mobile USA, Inc., VeriSign, Inc., and Jamster International Sarl (together, "petitioners") showed that the Ninth Circuit's refusal to enforce the terms of the parties' agreement to arbitrate individually conflicts with the Third Circuit's decision in *Gay* v. *CreditInform*, 511 F.3d 369 (3d Cir. 2007), the decisions of three additional federal circuit courts, and this Court's decisions applying Section 2 of the Federal Arbitration Act ("FAA"). Pet. 3-5 & n.2. Petitioners further showed that this case presents a recurring issue of national importance that affects contracts benefiting countless consumers and businesses: whether state-law unconscionability principles may be employed to discriminate against and prevent the enforcement of the terms of agreements to arbitrate individually in cases involving claims by a consumer. *Id.* at 2-5, 11-12.

As petitioners previously explained, this case presents the same question as in *T-Mobile USA, Inc.* v. *Laster*, No. 07-976 (filed Jan. 23, 2008), a case in which this Court has requested a response that is now due on April 25, 2008. Efficiency dictates that the petitions in both cases be considered together, and respondents have offered no reason why that course should not be followed. Moreover, because *Laster* involves a single set of claims, rather than the different theories of liability advanced against different defendants here (Opp. 3), *Laster* is a more suitable vehicle for addressing the fundamental issues that these cases present.

Respondents' brief in opposition does not seriously contest the significance of the questions presented in the petition. Instead, respondents seek to avoid

review through a number of insubstantial arguments. First, they mischaracterize the question presented here (Opp. 7-8), which involves a challenge to the Ninth Circuit's refusal to enforce individual arbitration as set forth in the parties' agreement and not its subsequent enforcement of a severance provision that only became relevant *after* the court below violated the FAA by striking down the parties' chosen arbitration procedures. Second, in arguing that there is no circuit conflict on the question presented here (*id.* at 9-11), respondents badly misconstrue *Gay* v. *CreditInform*, 511 F.3d 369 (3d Cir. 2007), ignore that the Ninth Circuit explicitly "declin[ed] . . . to follow" *Gay*, see *Lowden* v. *T-Mobile USA, Inc.*, 512 F.3d 1213, 1221 n.3 (9th Cir. 2008), and neither mention nor discuss the numerous other contrary circuit court decisions that hold that individual arbitration is appropriate for the effective resolution of claims by consumers. See Pet. 3-4 & n.2. Finally, in arguing that state law can preclude parties from choosing the procedures that will apply in arbitration (Opp. 8-9), respondents ignore that this Court has ruled that "the uniqueness of an agreement to arbitrate" may not be used as the basis for an unconscionability finding subverting arbitration. See *Perry* v. *Thomas*, 482 U.S. 483, 492 n.9 (1987). They also do not address that the Third Circuit, in *Gay*, applied *Perry* to hold that state law unconscionability principles could deny parties their federal right to enforce individual arbitration, which represents the heartland of alternative dispute resolution. *Gay*, 511 F.3d at 395.

In sum, the question presented raises an important issue that has generated a conflict among the federal circuits and warrants resolution by this Court. The petition for certiorari should be held pending the

Court's disposition of *T-Mobile USA, Inc.* v. *Laster*, No. 07-976 (filed Jan. 23, 2008), and then disposed of accordingly.

A. The "Question Presented" Properly Frames The Issues And Facts Of This Case.

Respondents lead with the argument that the "Question Presented" is not "applicable to the facts and circumstances of this action." Opp. 7-8. That claim is baseless.

Here, the parties agreed to arbitrate on an individual basis any disputes arising out of their contracts with petitioner T-Mobile. Pet. App. 30a. As this Court has explained, the FAA was enacted to ensure the enforcement of the procedures chosen by parties to resolve their disputes. *E.g.*, *Volt Info. Scis., Inc.* v. *Board of Trs.*, 489 U.S. 468, 479 (1989); 9 U.S.C. § 4. Indeed, a principal benefit of arbitration is that "by agreeing to arbitrate, a party 'trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.'" *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991). Here, the district court and Ninth Circuit refused to enforce an essential term of the parties' arbitration clause—their agreement to arbitrate individually—on grounds that petitioners contend violate the FAA. See Pet. 4-5; see also Pet. for Certiorari at 25-29, *T-Mobile USA, Inc.* v. *Laster*, No. 07-976 (filed Jan. 23, 2008). The question whether the Ninth Circuit violated the FAA when it refused to enforce individual arbitration is thus squarely presented in this case.

Indeed, the parties' inclusion of a severance provision in the event that individual arbitration were deemed unenforceable underscores the importance

that the parties attached to that aspect of their arbitration agreement. Petitioners do not challenge the lower courts' enforcement of the severance provision, but instead attack the antecedent determination that individual arbitration agreed to by the parties is not enforceable in accordance with their agreement's terms. See 9 U.S.C. § 4. This case squarely presents that issue, which, as shown below, implicates a substantial conflict among the federal courts of appeals.

B. The Decision Below Conflicts With Rulings By Numerous Other Courts.

Respondents' argument (Opp. 9-11), that there is no conflict among the federal courts is based upon (i) a misreading of the Third Circuit's decision in *Gay*, and (ii) a refusal to address multiple decisions of other courts of appeals that uphold individual arbitration because it allows for the effective vindication of statutory rights in cases involving causes of action indistinguishable from those at issue here.

1. Respondents' discussion of the Third Circuit's ruling in *Gay* is not a fair reading of that decision. See Opp. 10. In *Gay*, the Third Circuit ruled that state-law decisions holding that agreements to resolve consumer claims by individual arbitration were unconscionable must give way to the FAA's federal mandate that such agreements be enforced. 511 F.3d at 394. That ruling did not turn on any claim that "the *statutes* upon which [plaintiff] based her claims required a judicial forum" or that "a specific statute provided her the right to assert her claims as a class action." Opp. 10 (emphasis in original). To the contrary, the Third Circuit explained that state unconscionability law was preempted by the FAA because the state decisions improperly "'rely on the uniqueness of an agreement to arbitrate as a

basis for a state-law holding that enforcement would be unconscionable.'" 511 F.3d at 394 (quoting *Perry*, 482 U.S. at 492 n.9).

That ruling by the Third Circuit is in conflict with the Ninth Circuit's rejection, in the ruling below, of the "argument that California [unconscionability] law is preempted by the [FAA]." Pet. App. 3a (following *Shroyer* v. *New Cingular Wireless Servs., Inc.*, 498 F.3d 976, 987-93 (9th Cir. 2007)). And, although respondents assert that the Ninth Circuit's decision in *Lowden*, 512 F.3d at 1221, is distinguishable from *Gay*, they never attempt to explain how, Opp. 10-11, while they studiously avoid the Ninth Circuit's explicit choice not to "follow" *Gay*. 512 F.3d at 1221 n.3.

What respondents cannot avoid is that the *Gay* court considered and rejected the very argument that the court below accepted: that *state* unconscionability law could be employed as a basis for denying the parties' federal right under the FAA to arbitrate disputes individually. See *Gay*, 511 F.3d at 394 (quoting *Perry*, 482 U.S. at 492 n.9) The Third Circuit in *Gay* ruled that even though state law "cases are written ostensibly to apply general principles of contract law, they hold that an agreement to arbitrate may be unconscionable simply because it is an agreement to arbitrate." *Id.* at 395. As such, the Third Circuit ruling that Pennsylvania unconscionability law was preempted by the FAA is in conflict with the Ninth Circuit's decision in this case. See *id.* (following *Perry*, 482 U.S. at 492 n.9).[1]

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[1] Respondents likewise assert that *Tillman* v. *Commercial Credit Loans, Inc.*, 655 S.E.2d 362 (N.C. 2008), does not conflict with *Gay*. Opp. 11. *Tillman* relied upon state policy to rule that a class waiver in an arbitration agreement was unenforceable.

2. In addition, respondents say nothing in response to petitioners' showing that the decision below conflicts with decisions from four separate circuits, which hold that individual arbitration allows for effective vindication of claims by consumers. Pet. 3-4 & n.2; see also Pet. for Certiorari at 11-25, *T-Mobile USA, Inc.* v. *Laster*, No. 07-976 (filed Jan. 23, 2008).

In contrast to the Ninth Circuit, four different circuits have upheld individual arbitration in cases involving small claims by consumers because individual arbitration allows for the effective vindication of statutory rights. See Pet. 4 n.2. (citing cases). For example, in *Johnson* v. *West Suburban Bank*, 225 F.3d 366, 373 (3d Cir. 2000), then-Chief Judge Becker ruled that individual arbitration allowed for the effective vindication of substantive rights because it did "not eliminate plaintiff incentives to assert rights under the [Truth In Lending Act]." *Id.* at 374.

In *Snowden* v. *CheckPoint Check Cashing*, 290 F.3d 631 (4th Cir. 2002), the Fourth Circuit likewise rejected a consumer's claim that an agreement to arbitrate individually was unconscionable on the alleged ground that "without the class action vehicle, [plaintiff] will be unable to maintain her legal representation given the small amount of her individual damages." *Id.* at 638. Instead, the court ruled that plaintiff's fears about the loss of her legal representation were unfounded because "'[a]ttorneys' fees'" were recoverable by a prevailing plaintiff in

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655 S.E.2d at 373. As the dissent noted, the majority failed to consider whether this Court's jurisprudence or the FAA preempted state law, *id.* at 386-87 (Newby, J., dissenting), and created a direct conflict between the majority's ruling and *Gay*, *id.* at 387.

arbitration. *Id.* at 638-39. *Accord Livingston* v. *Associates Fin., Inc.*, 339 F.3d 553, 559 (7th Cir. 2003).

And, in *Jenkins* v. *First American Cash Advance of Georgia, LLC*, 400 F.3d 868 (11th Cir. 2005), *cert. denied*, 546 U.S. 1214 (2006), the Eleventh Circuit held that the denial of a class-action mechanism was not unconscionable. *Id.* at 877-78. Instead, the court ruled that the availability of attorney's fees under the arbitration agreement provided plaintiffs with effective access to legal representation, and therefore "arbitration agreements prohibiting class action relief do not necessarily choke off the supply of lawyers willing to pursue claims on behalf of debtors." *Id.* at 878 (internal quotation marks omitted).

Here, of course, there is no dispute that respondents would be entitled to recover reasonable attorneys' fees and costs if they prevail on their underlying claims. Pet. App. 12a & n.4. Under the rulings in the Third, Fourth, Seventh, and Eleventh Circuits, individual arbitration should have been enforced as a matter of federal law because respondents would be able effectively to vindicate their statutory rights. Yet, because respondents brought their claim in California, the parties' agreement to arbitrate individually was deemed unconscionable by the Ninth Circuit, which has held that even when a party may recover reasonable attorneys' fees and costs, individual arbitration is nevertheless unenforceable. See *Shroyer* v. *New Cingular Wireless Servs., Inc.*, 498 F.3d 976, 986 (9th Cir. 2007).

In short, there is a plain and stark conflict between the decision below and decisions of other federal courts of appeals across the country.

C. The Decision Below Violates The FAA And Is Preempted.

Finally, respondents argue on the merits that application of the FAA to compel enforcement of the arbitration clause in this case would afford special treatment to contracts to arbitrate by precluding enforcement of generally-applicable contract law. Opp. 8-9. As shown above, respondents' arguments implicate issues that have generated conflicts among the lower courts and that warrant resolution by this Court. In all events, respondents' arguments should be rejected on the merits.

Section 2 of the FAA mandates the enforcement of agreements to arbitrate except upon grounds available for the "revocation of any contract." 9 U.S.C. § 2. In *Southland Corp.* v. *Keating*, 465 U.S. 1 (1984), this Court reversed the California Supreme Court's refusal to enforce an agreement to arbitrate based on a state law that prohibited agreements to "'waive compliance with any provision'" of state franchise law. *Id.* at 10. This Court held that that provision of state franchise law was preempted because it was not "a ground that exists at law or in equity 'for the revocation of *any* contract.'" *Id.* at 16 n.11 (emphasis added by the Court) (quoting 9 U.S.C. § 2). That holding applies equally here because, on its face, the test crafted by the California Supreme Court and adopted by the Ninth Circuit below applies only to certain consumer contracts, and not "any contract," as required by Section 2 of the FAA. See Opp. 5. Moreover, respondents cannot avoid preemption by arguing that the decision below applied a court-made rule rather than a statute (Opp. 10), because the preemptive effect of the FAA does not depend on whether offending state law is "of legislative or judicial origin." *Perry*, 482 U.S. at 492 n.9.

Respondents further insist that the Ninth Circuit merely applied the generally applicable principle that California will not enforce contract provisions that serve to exculpate a party from liability. Opp. 5-6. Specifically, respondents rely upon the California Supreme Court's invocation of California Civil Code § 1668 to justify the decision not to enforce the arbitration agreement here. See *id.* at 5 (quoting *Discover Bank*, 113 P.3d at 1110).[2]

But California law is clear that, "[d]espite its broad language, section 1668 does not apply to every contract." *Vilner* v. *Crocker Nat'l Bank*, 89 Cal. App. 3d 732, 735 (1979). On the contrary, that principle applies only to the subset of contracts that involve the "public interest." *Tunkl* v. *Regents*, 383 P.2d 441 (Cal. 1963); see also *Cregg* v. *Ministor Ventures*, 148 Cal. App. 3d 1107, 1111 (1983) (same); 1 Witkin, *Summary of California Law* § 660, at 737-38 (10th ed. 2005) (same). Thus, § 1668, which underpins *Discover Bank* and the decision below, does not provide a basis for refusing to enforce an agreement to arbitrate individually because it is not a "ground[] as exist[s] in law or equity for the revocation of *any* contract." 9 U.S.C. § 2 (emphasis added).

Second, in any event, the suggestion that individual arbitration would "exculpate" petitioners from liability simply ignores the contrary decisions of multiple federal courts of appeals, which have held that individual arbitration allows consumers effectively to vindicate their statutory rights. As the Third Circuit

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[2] Section 1668 provides: "All contracts which have for their object, directly or indirectly, to exempt any one from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law."

has explained, even where the potential recovery is small, the prospect of recovering reasonable attorneys' fees ensures that such cases can be prosecuted effectively through individual arbitration. *Johnson*, 225 F.3d at 373.

The contrary conclusion adopted by the Ninth Circuit in *Shroyer*, *i.e.*, that the attorneys' fees that an arbitrator indisputably could award if respondents prevail on their substantive claims would be inadequate, hearkens back to the "longstanding judicial hostility to arbitration agreements." *Gilmer*, 500 U.S. at 24. Indeed, such a view is out of step with this Court's decisions enforcing parties' agreement to arbitrate over the past 25 years, and cannot be reconciled with the "liberal federal policy favoring arbitration agreements." *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983); *cf. Gay*, 511 F.3d at 393 n.17 (noting that in consumer contracts generating small fees, businesses have "a legitimate reason to seek to avoid expensive litigation to resolve disputes with [their] customers and instead resolve [their] disputes less formally and probably less expensively in arbitration"). In all events, if there were any doubt on this issue, "the [FAA] establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone*, 460 U.S. at 24-25.

This case, like *Laster*, presents the important and recurring issue of whether state unconscionability law can be employed in a manner that, in practice, applies only to arbitration agreements and which "could result in a significant narrowing of the application of the FAA." *Gay*, 511 F.3d at 395. What is at stake is nothing less than the ability of parties to agree to trade the costs, delay and complexity of

litigation for the "'simplicity, informality and expedition of arbitration.'" *Gilmer*, 500 U.S. at 31.

CONCLUSION

For these reasons, and those set forth in the petition, the petition for a writ of certiorari should be held pending the Court's disposition of *T-Mobile USA, Inc.* v. *Laster*, No. 07-976 (filed Jan. 23, 2008), and then disposed of accordingly.

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